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IN THE

Supreme Court of the United States

No. 71-397

CAPITAL ELECTRIC POWER ASSOCIATION, ET AL., *Petitioners*

v.

FEDERAL POWER COMMISSION and MISSISSIPPI POWER & LIGHT COMPANY, *Respondents*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR MISSISSIPPI POWER & LIGHT COMPANY IN OPPOSITION

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OPINIONS BELOW

The Petition makes adequate reference to the opinion in the court below and the orders of the Federal Power Commission.

JURISDICTION

The jurisdictional requisites are set forth in the Petition.

QUESTION PRESENTED

It is respectfully submitted that the following question, rather than the question urged by the Petitioners, is the one correctly here presented, in the light of the order of the Court of Appeals (Petition App. A, p. A1):

Whether the Court of Appeals correctly granted the motion of the Federal Power Commission to dismiss the Petitioners' petition for review in that court on the basis of *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division,* 358 U.S. 103 (1958), because the contracts between Petitioners and Mississippi Power & Light Company (MP&L) provide for a rate increase filing with the Federal Power Commission.

STATUTES AND REGULATIONS INVOLVED

The statutory provisions involved are set forth in the Petition. In addition, Sections 35.2, 35.4, 35.5, and 35.13 of the Commission's Regulations under the Federal Power Act are involved.

STATEMENT OF THE CASE

This case involves a determination by the Federal Power Commission that the contracts between Petitioners and MP&L contemplated changes in the rates and charges on file with the Commission and, hence, the filing of increased rates by MP&L under Section 205(d) of the Federal Power Act was in accordance with the holding in *Memphis, supra.*

On November 16, 1970, MP&L filed changes in rates for sales to eight rural-electric-cooperative customers to become effective January 22, 1971.

On December 22, 1970, the Commission received a joint "Protest and Petition to Intervene and for Rejection of Rate Schedules Submitted for Filing" from Petitioners. After a response by MP&L on January 8, 1971, the Commission issued an order on January 21, 1971, which stated that certain issues raised by Petitioners should be determined on the basis of an evidentiary hearing and consequently directed that a public hearing be held. (Hearings have been concluded and the proceeding is now before the presiding examiner for decision.) After examining the data filed by MP&L in support of its proposed increased rates, the Commission found that a full five-month statutory suspension period was not justified and suspended the tendered rate schedule supplements for one day. The Commission's order also provided for refunding any portion of the increased rates which were ultimately found to be unjustified.

In this order, the Commission dealt with Petitioners' argument that the rate agreements between them and MP&L did not provide for unilateral rate change filings by the Company and that such filings were invalid, but, as previously indicated, the Commission concluded that the rate contracts contemplated changes in the rates and charges on file with the Commission. Consequently, the Commission denied Petitioners' petition to reject the proferred rate filings.

On February 22, 1971, Petitioners filed an application for rehearing and on March 22, 1971, the Commission issued a second order in this proceeding stating that its rules do not permit an application for rehearing of an interlocutory order. Thereupon, Petitioners filed their petition for review with the Court of Appeals on March 29, 1971.

MP&L was permitted to intervene in the Court of Appeals. As previously indicated the Court of Appeals granted the Commission's motion to dismiss and denied the petition for review. The Court of Appeals also denied a petition for rehearing (Petition App. B, p. A2).

It is noteworthy that throughout Petitioners' "Statement" there runs the theme that somehow it was granted short shrift by the Commission and by the Court of Appeals: The Commission "brushed aside" Petitioners' contention with only a "sparse discussion of the issue" and "accorded only the most summary and superficial consideration to the issues raised by Petitioners" (p. 4). The Court of Appeals dismissed the appeal without oral argument with a "summary" order containing only a reference to the *Memphis* case (p. 5). This indicates the weakness of the Petitioners' contentions.

ARGUMENT IN OPPOSITION

In order to give some emotional appeal to granting the writ, Petitioners, misconstruing the meaning of the Commission's order, paint a frightening picture of the Natural Gas Act and Federal Power Act becoming a "shambles" with the resulting "real threat" to the continuation of the consumer-owned segment of the utility industry.[1] This argument is based upon the allegation that the Commission has permitted MP&L to "unilaterally increase its rates without the agreement of the customers" (p. 5). As shown in this brief the

[1] The reference to the Natural Gas Act is particularly inapposite since the tariffs of "natural gas companies" also contain provisions specifically modeled on the holding in *Memphis*.

opposite is true and the contracts specifically provide for MP&L's rate filing. Further, this argument ignores the provisions of both Acts which provide that any increased rates are collected under bond and any excess in the amount determined to be fair and reasonable must be refunded.

The Petitioners argue, as reasons for granting the writ, that the decision of the court below (a) conflicts with applicable decisions of this Court,[2] (b) conflicts with the decisions of four other courts of appeals,[3] and (c) conflicts with its own decisions.[4] Petitioners further argue that the Commission's interpretation of Section 205 of the Federal Power Act in this case conflicts with its interpretation of that section in other cases.[5]

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[2] *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

[3] *Mobile Gas Service Corp.* v. *Federal Power Commission*, 215 F.2d 883 (3rd Cir. 1954); *Natural Gas Pipe Line Co.* v. *Federal Power Commission*, 253 F.2d 3 (3rd Cir. 1958); *Shell Oil Co.* v. *Federal Power Commission*, 334 F.2d 1002 (3rd Cir. 1964); *South Carolina Generating Co.* v. *Federal Power Commission*, 249 F.2d 755 (4th Cir. 1957); *Pure Oil Co.* v. *Federal Power Commission*, 299 F.2d 370 (7th Cir. 1962); *Phillips Petroleum Co.* v. *Federal Power Commission*, 227 F.2d 470 (10th Cir. 1955), *cert. den.*, 350 U.S. 1005; *Cities Service Gas Co.* v. *Federal Power Commission*, 255 F.2d 860 (10th Cir. 1958); *Phillips Petroleum Co.* v. *Federal Power Commission*, 258 F.2d 906 (10th Cir. 1958); *Pan American Petroleum Corp.* v. *Federal Power Commission*, 352 F.2d 241 (9th Cir. 1965).

[4] *Sierra-Pacific Power Co.* v. *Federal Power Commission*, 223 F.2d 605 (D.C. Cir. 1955), *aff'd.*, 350 U.S. 348 (1956); *Tyler Gas Service Co.* v. *Federal Power Commission*, 247 F.2d 590 (D.C. Cir. 1957), *cert. den.*, 355 U.S. 895 (1957); *Mississippi River Fuel Corp.* v. *Federal Power Commission*, 281 F.2d 919 (D.C. Cir. 1960); *Jupiter Corp.* v. *Federal Power Commission*, 424 F.2d 783 (D.C. Cir. 1969).

[5] *Shell Oil Company*, 29 F.P.C. 498, (1963); *Delmarva Power & Light Company*, — F.P.C. —, Docket No. E-7560 (Nov. 27, 1970).

The arguments put forth by Petitioners have no merit. They urge (Petition, p. 10) that the *Mobile* and *Sierra* cases decided by this Court are the basis for the decisions by the Courts of Appeals for the Third, Fourth, Seventh, and Tenth Circuits and are in conflict with the decision of the court below, which decision, in turn, they say conflicts with that court's decisions in other cases. In fact, there can be no conflict among the decisions, for, as pointed out in the order of the court below, and by the order of the Commission, the applicable case in point is *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division,* which was decided by this Court after the *Mobile* and *Sierra* cases. *Mobile* and *Sierra* were concerned with *fixed rate* contracts. *Memphis* distinguished these from the changeable rate type of contract such as the ones between MP&L and Petitioners:

> "The United contract now before us, as construed by the Federal Power Commission and as viewed by the Court of Appeals for the purposes of decision, *is vitally different from that in Mobile.* On this view of the contract United bound itself to furnish gas to these customers during the life of the agreements *not at a single fixed rate,* as in Mobile, but at what in effect amounted to its current 'going' rate. Contractually this left United free to change its rates from time to time, subject, of course to the procedures and limitations of the Natural Gas Act. In such circumstances there is nothing in Mobile which suggests that United was not entitled to file its new schedules under § 4(d), or that the Commission had no jurisdiction to consider them under § 4(e)." (358 U.S. 103, 109, 110) (Emphasis added)

In *Mobile,* this Court held that a selling natural gas company could not unilaterally change the rates pro-

vided for in a contract subject to the jurisdiction of the Federal Power Commission unless the contract authorized it to do so. In that case, the contract between United Gas Pipe Line Company and Mobile Gas Service Corp. did not provide for any changes in the agreed rate during the life of the contract, and this Court therefore held that United could not unilaterally increase the rate for natural gas it delivered to Mobile pursuant to that contract. The contractual provision at issue in *Memphis,* on the other hand, read as follows:

> "All gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule . . . , *or any effective superseding rate schedules,* on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached thereto and filed with the Federal Power Commission which are by reference made a part hereof." 358 U.S. at 105. (Emphasis the Court's.)

This Court held that the contract thus gave United the right "to change its rates from time to time, subject, of course, to the provisions and limitations of the Natural Gas Act." (358 U.S. at 110.)

The rate provision of the contracts entered into by MP&L and Petitioners is similar to that considered by this Court in *Memphis* and brings this case within that holding. It provides as follows:

> "3. *Rate.* Association shall pay Company for electric power and energy furnished hereunder for its own use and for resale directly to ultimate consumers in accordance with Rate Schedule REA-10, attached hereto and made a part hereof.
>
> "Service shall be taken and paid for under and in accordance with said rate schedule as provided

> above *or such other effective superseding rate schedule as may be authorized by duly constituted regulatory authority. Either party may seek authorization* through regulatory procedures for such change as may be necessary to make any schedule used for billing just and reasonable." (Emphasis added.)

This provision clearly states that the price to be paid for electric power and energy taken under the contract is to be determined according to Rate Schedule REA-10, *or* "such other effective superseding rate schedule as may be authorized by duly constituted regulatory authority." Further, "either party may seek [such] authorization for such change," which is exactly what MP&L did when it filed for a rate increase.

The quoted language is very broad and unrestricted. It embraces any procedures contemplated under the Federal Power Act, including Sections 205 and 206. The rate provision of the contract, in short, explicitly gives MP&L the right to make the rate filings which Petitioners are now challenging.

The Commission and Court of Appeals for the District of Columbia Circuit have not, contrary to Petitioners' assertion, refused to follow the holdings of *Mobile* and *Sierra*. Rather, these cases, as clarified by this Court's holding in *Memphis,* support MP&L's filing, since they hold that a public utility can provide by contract for the right to unilaterally file for a rate increase by complying with the requirements of the appropriate regulatory authority. Scores of such filings have become effective since *Memphis* was decided. Thus, the language used in MP&L's contracts is similar to that in service agreements filed as part of their tariffs by a number of companies regulated by the Com-

mission which, for many years, have been accepted without challenge as meeting the requirements of *Mobile* and *Sierra.*

Prior to the decisions of this Court in 1956 in *Mobile* and *Sierra,* the contracts between MP&L and Petitioners contained a single fixed rate:

> "3. Rate. Association shall pay Seller for all electric energy furnished hereunder at the rates and on the terms and conditions set forth in Rate Schedule REA-8 attached hereto and made a part hereof."

After this Court's decisions in *Mobile* and *Sierra,* new contracts between MP&L and Petitioners specifically provided for rate changes:

> "3. Rate. Association shall pay Seller for electric power and energy furnished hereunder for resale to ultimate consumers in accordance with Seller's Rate Schedule REA-8 attached hereto and made a part hereof, *or such other effective superseding rate schedule as may be authorized by duly constituted regulatory authority.* Either party may seek authorization through regulatory procedures for such change as may be necessary to make any schedule used for billing under this Agreement For Purchase Of Power just and reasonable." (Emphasis added)

As previously pointed out, substantially identical language was considered by the Commission and this Court in the *Memphis* case. It was clear in *Memphis,* as it is here, that the contracts were not fixed price contracts but rather contained provisions for changing the rate during the term of the agreements.

In *Memphis,* the argument was made that:

> "the 'effective superseding rate' clause of the agreements must be read as referring only to

> superseding rates established after a § 5(a) proceeding . . . ." (358 U.S. at 115)[6]

In affirming the Commission's order, this Court rejected that argument by stating that:

> *"the clause would be entirely superfluous if construed as respondents would have it,* since as a matter of law rate changes ordered by the Commission after a § 5(a) proceeding would have been incorporated into the agreements." (Id.) (Emphasis added) [7]

Therefore, it is clear that regardless of what the contracts provide, any prospective changes in rates ordered by the Commission under Section 5(a) for natural gas companies, or Section 206(a) for public utilities, would have to be incorporated into the contracts to be thereafter observed.

The above reasoning demonstrates that Section 3 of the contract between MP&L and Petitioners was not limited to changes under Section 206 of the Federal Power Act, as Petitioners assert (Petition, pp. 7-9). It is unreasonable to believe that the parties intended Section 3 to be a nullity when they renegotiated the contracts and specifically added language permitting rate changes.

The language of these contracts falls squarely within the holding of *Memphis* which affirmed the right of a company to change its rates from time to time, subject, of course, to the procedures and limitations of the

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[6] Section 5(a) of the Natural Gas Act is comparable to Section 206(a) of the Federal Power Act.

[7] Ibid.

Natural Gas Act or Federal Power Act, whichever is applicable. As this Court said in *Memphis:*

> "The United contract now before us, as construed by the Federal Power Commission and as viewed by the Court of Appeals for the purposes of decision, *is vitally different from that in Mobile.* On this view of the contract United bound itself to furnish gas to these customers during the life of the agreements *not at a single fixed rate,* as in Mobile, but at what in effect amounted to its current 'going' rate. Contractually this left United free to change its rates from time to time, subject, of course, to the procedures and limitations of the Natural Gas Act. In such circumstances there is nothing in Mobile which suggests that United was not entitled to file its new schedules under § 4(d), or that the Commission had no jurisdiction to consider them under § 4(e)." (358 U.S. 103, 109, 110) (Emphasis added)

Petitioners assert that "the Federal Power Commission does not 'authorize' a rate schedule as the result of a filing made by a public utility under Section 205(d)" (Petition, p. 7), and that such filing "does not constitute the filing of a proposed change but a notice to the Commission of a change made by the company, and the change is effected, if at all, not by an order of the Commission, but solely by virtue of the company's own action." (Petition, p. 7) Petitioners' argument is based on a misinterpretation of the word "authorized" and a lack of understanding of the Commission's function under the Federal Power Act. The dictionary (Webster's New Collegiate Dictionary, 1959 Edition) states that one of the meanings of "authorize" is "to permit." A rate schedule becomes effective not solely at the company's pleasure but through "permission" by the Commission. Section 35.4 of the Regulations,

entitled "*Permission* to become effective is not approval," provides: "The fact that the Commission *permits* a rate schedule . . . to become effective does not constitute approval." (Emphasis added)

Similarly, Section 35.2(e) which defines "effective date" states:

> "As used herein the 'effective date' of a rate schedule shall mean the date on which a rate schedule filed and posted pursuant to the requirements of this part is *permitted by the Commission* to become effective as a filed rate schedule. The effective date shall be 30 days after the filing date, or such other date as may be specified by the Commission."

A rate schedule is "tendered" for filing by a utility (Section 35.3) and if the Commission "permits," it becomes effective. Simply because this "permission" may be given without a formal statement on the part of the Commission in no way changes its character. There is nothing unique about the Commission performing an act without a written declaration of it. For example, unless the Commission acts upon an application for rehearing within thirty days after it is filed, "such application shall be deemed to have been denied" (Section 1.34 of the Commission's Rules of Practice and Procedure).

Although "permission" to become effective does not constitute approval of such rate schedule (Section 35.4), it does provide the "authorization" by the Commission necessary to make a superseding rate schedule effective.

It can be assumed that when the parties revised Section 3, they meant its terms to be interpreted in their

normal English meaning. It is highly significant that Webster's definition corresponds exactly with the term used by the Commission in its regulations governing Section 205 filings.

From the foregoing it is clear that, as the Commission found, and the court below agreed, the rate provision in the contract between MP&L and Petitioners was not a "fixed rate contract" but a provision which reserved for MP&L the right to file for a rate increase. Thus, as pointed out by the court below, the controlling case is *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division.* As such, there is no conflict between the decision of the court below and the decisions of this Court or those of other tribunals cited by Petitioners. Therefore, since this Court's decision in the *Memphis* case is fully determinative of the outcome in the present proceeding, it is unnecessary for this Court to grant Petitioners' Writ of Certiorari.

CONCLUSION

WHEREFORE Premises Considered, it appears that there are no special and important reasons for the Court to review this case, and accordingly Mississippi Power & Light Company prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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PROOF OF SERVICE

Service of this Brief for Mississippi Power & Light Company has been made upon the Federal Power Commission by mailing copies hereof postage prepaid to Mr. Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D. C. 20530, and upon Capital Electric Power Association, et al., by mailing copies hereof airmail postage prepaid to its attorneys this 18th day of October, 1971.

Attorney for Respondent